

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

76-7561

United States Court of Appeals

FOR THE SECOND CIRCUIT

GARDNER-DENVER COMPANY,

Plaintiff-Appellee,

—against—

DIC-UNDERHILL CONSTRUCTION COMPANY, DIC-CONCRETE
CORP., Dic-UNDERHILL J.V. & Co., Dic-UNDERHILL
JOINT VENTURE,

Defendants-Appellants,

and

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLANTS' BRIEF

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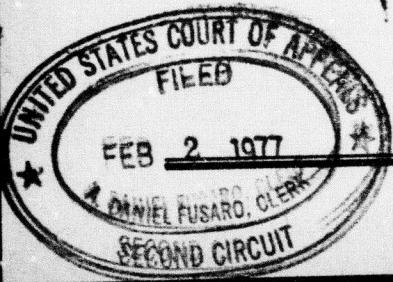


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Statement of Issues

Was the District Court below (Motley, J.) in error in
denying defendants-appellants' motion to dismiss?

Statement of the Case

This is an action for money damages arising as a result
of the theft of an air compressor rented by defendants-
appellants from the plaintiff-appellee. The action pro-

ceeded to a jury trial in the Southern District of New York, Motley, J., on October 5, 6, 7 and 8, 1976.

At the commencement of the trial, all defendants moved to dismiss the action (12a-42a) in accordance with the affirmative defenses pleaded in the answer (9a, 10a). The motion was granted and the action was dismissed as to defendant, The Port Authority of New York and New Jersey, but denied as to defendants-appellants. The jury returned a verdict in the sum of \$29,000 on October 8, 1976. Judgment in the sum of \$29,000 was entered October 15, 1976, and an amended judgment in the sum of \$34,505 was entered on November 11, 1976. Defendants Dic-Underhill thereupon filed a notice of appeal.

Statement of Facts

The factual situation underlying this litigation is simple. Defendants-Appellants Dic-Underhill had entered into a written contract (known as WTC-117.00, Exhibit I not in evidence) with defendant Port Authority for the performance of a large amount of concrete construction at the World Trade Center. The terms of the contract made defendants-appellants Dic-Underhill the agent of defendant Port Authority, (110a-115a) especially with respect to the rental of construction equipment (112a).

About August 3, 1973, plaintiff-appellee delivered on rental, an 8-ton, 1,200 cfm diesel powered air compressor, to defendants-appellants, as agent for defendant, to the World Trade Center (65a).

Defendants-appellants did not attempt to render the compressor "theft-proof" by disabling it or chaining it (49a, 50a, 53a) and it was stolen from the interior of the site on the night of August 15-16, 1973 by persons unknown (49a,

51a, 56-7a). Plaintiff-appellee thereafter sent an invoice (Exhibit B 108a) to defendants-appellants as agent, for the value of the stolen compressor. Prior to the theft, defendants-appellants had written checks to plaintiff-appellee (in payment of other invoices) specifically as agent of the Port Authority (Exhibits K and L, not in evidence, 117a, 118a). Afterward, plaintiff-appellee continued to deal with defendants-appellants as agents as further shown by its letter to them (Exhibit C, 109a).

In denying the motion to dismiss as to defendants-appellants, the Court ruled that no evidence as to the agency would be received in the case (30a, 38a, 42a). An offer of proof (39a, 40a) was then made to establish the agency relationship between them and defendant through the contract (WTC-117.00, Exhibit I, not in evidence, 110a-115a), an invoice sent by plaintiff (Exhibit J, not in evidence, 116a), the aforementioned checks (Exhibits K and L, not in evidence, 117a, 118a) and thus prove plaintiff knowingly dealt with a disclosed agent for a disclosed principal—and had in fact done so for some time past.

After the denial of the motion to dismiss, the case proceeded to trial against defendants-appellants only, and the jury returned a verdict in favor of the plaintiff-appellee.

POINT I

Defendants-Appellants, as the Disclosed Agent of a Disclosed Principal Are Not Separately and Independently Liable for Negligence Under the Facts as Adduced on the Trial Below.

The District Court excluded any proof as to the agents principal relationship between defendants-appellants and defendants. Such action prevented consideration of the fact that defendants-appellants were not only recognized as an agent by plaintiff-appellee, but were dealt with by it in such agent capacity, rather than as principals.

In the law of the State of New York, which is applicable to this diversity case, a precise line is drawn between those acts of negligence for which an agent will be required to respond, and those for which the principal only will be required to answer.

The sharp distinction is between nonfeasance and misfeasance. For negligence comprising misfeasance—generally evinced by affirmative acts of wrongdoing—the agent must respond in damages as well as the principal for whom the agent acted while within the scope of the agency. *Rhynders v. Greene*, 255 App. Div. 401 (3rd Dept. 1938).

But the rule is otherwise when nonfeasance is the basis of the claimed negligence. Here, with one exception (see e.g. *Gardner v. 1111 Corp.*, 286 App. Div. 110 [1st Dept., 1955], aff'd 1 N.Y. 2d 758 [1956]) inapplicable to the case at bar, the principal alone is answerable.

The general rule was stated definitively in *Murray v. Usher*, 117 N.Y. 542, 547, (1889) where Judge Andrews said:

“* * * But the agent or servant is himself liable as well as the master, where the act producing the injury, although committed in the master's business, is a direct trespass by the servant upon the person or property of another, or where he directs the tortious act. In such cases the fact that he is acting for another does not shield him from responsibility. The distinction is between misfeasance and non-feasance. For the former the servant is, in general, liable; for the latter, not. The servant, as between himself and his master, is bound to serve him with fidelity and to perform the duties committed to him. An omission to perform them may subject third persons to harm, and the master to damages. But the breach of the contract of service is a matter between the master and servant alone, and the non-feasance of the servant causing injury to third persons is not, in general, at least, a ground for a civil action against the servant in their favor. (citations omitted)”

There is no liability that fastens upon the agent unless the intent is clear to super-add such liability to that of the principal. *Savoy Record Co. Inc. v. Cardinal Export Corp.*, 15 N.Y. 2d 1, 5 (1964) and *Mencher v. Weiss*, 306 N.Y. 1, 4 (1953) where the Court said:

“We commence with the rule that where there is a disclosed principal-agent relationship and the contract relates to a matter of the agency, the agent will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or super-add his personal liability for, or to, that of his principal. (*Keskal v. Modrakowski*, 249 N.Y. 406; *Ell Dee Clothing Co. v. Marsh*, 247 N.Y. 392; *Hall v. Lauderdale*, 46 N.Y. 70, 74.)”

A more recent case, *Jones v. Archibald*, 45 A.D. 2d 532 (4th Dept., 1974) notes that, to hold the agent as well as his principal, “[t]here must be affirmative acts of negligence or wrongdoing.” (45 A.D. 2d at p. 535) and that:

“... an agent who has undertaken no individual responsibility, nor expressly obligated himself in a contractual relationship with a third party cannot be held liable for nonfeasance only (*Greenauer v. Sheridan-Brennan Realty Co.*, 224 App. Div. 199, 202; *Lutz Feed Co. v. Audet & Co.*, 72 Misc 2d 28, 31; 2A Warren’s Negligence, § 3.03, pp. 50-55).” (45 A.D. 2d at p. 535).

The evidence adduced in the trial, while clearly bespeaking nonfeasance (assuming for the purposes of this appeal that negligence was proved by the weight of the evidence) contains nothing that could be any stretch of the imagination be called misfeasance. What did defendants-appellants do after they accepted delivery of an 8-ton air compressor from plaintiff-appellee?

- a) They let it alone;
- b) They did not station a guard at it; (81a, 82a, 103a)
- c) They did not remove a wheel; (76a)
- d) They did not deflate a tire; (76a)
- e) They did not remove a tow-bar; (104a)
- f) They did not chain the compressor to some larger object; (49a, 77a)
- g) They relied upon Port Authority police patrols; (103a)
- h) They relied upon civilian guards furnished by others. (96a, 103a)

The lack of affirmative action by defendants-appellants was, quite obviously, based upon the fence and building that enclosed the construction area where the compressor was, and the safety enjoyed during the previous years by other large, and more mobile equipment at the very same site of the World Trade Center. (57a, 59a, 60a). The picture that appears is a classic picture of nonfeasance.

In this light, the refusal of the trial court to allow proof of the agency relationship was, we submit, clearly error. An offer of proof was made to show plaintiff-appellee's knowledge and acceptance of the agency as evidenced by the Contract (WTC-117.00—Exhibit I, not in evidence 110a-115a).

"The Contractor shall act as the agent of the Authority . . . for the purpose of all materials, including all tools, temporary materials and equipment necessary or proper for or incidental to the installation of all concrete construction . . . and in the exercise of such agency shall assume all the obligations and duties imposed upon him by this Contract." (110a).

"* * * The Authority will advance to the Contractor sums for the payment of purchases by the Contractor as agent of the Authority for materials, tools and equipment." (111a).

"The Contractor shall also act as the agent of the Authority . . . for the rental of all construction equipment necessary or proper for or incidental to the performance of the Contract and, in the exercise of such agency shall assume all the obligations and duties imposed upon him by this Contract." (111a).

"The agency provided for hereunder . . ." (112a).

"The Contractor shall be deemed to occupy a position of trust and confidence with respect to the Authority . . ." (112a).

"The purchase by the Contractor of the materials, tools and equipment, and rental of equipment, as agent of the Authority hereunder . . ." (113a).

"The Authority will defend, indemnify and hold harmless the Contractor and the principals of the Contractor against civil liability for all claims, losses, suits . . . arising out of or in connection with or relating to the Contractor's operations under this Contract . . ." (114a).

the checks written by defendants-appellants to plaintiff-appellee (Exhibits K and L—not in evidence, 117a, 118a) on a check form headed:

"Dic-Underhill, a Joint Venture
The World Trade Center
Purchasing Agent for
The Port of New York Authority"

which checks were in payment of repair services; and a prior purchase invoice for another compressor (Exhibit J, not in evidence, 116a) directed to:

"Port of Authority
c/o Dic Underhill"

In addition, two documents identified on the offer of proof were later received in evidence on trial. After the theft of the compressor, plaintiff-appellee sent an invoice for the full price of the compressor headed:

"Charge to
Dic & Underhill Agents
Port of New York Authority" (108a)

and subsequently, when defendants-appellants requested the basis of said invoice from plaintiff-appellee, the latter wrote an answering letter to:

"Dic-Underhill
Agents of New York Port Authority" (109a).

The evidence which was received at the trial, as well as that which was the subject of the offer of proof, shows clearly that had the Trial Court not excluded the basic question of agency from consideration, the agency and appellee's knowledge and acceptance of the agency relationship would have been proved, with the consequence that there would be no liability on the defendants-appellants, acting as agents.

CONCLUSION

Defendants-appellants were the disclosed agents of their principal, and plaintiff-appellee dealt with them as agents for a period of some 3 and one-half years prior to the leasing of the stolen compressor.

The application of the rule relating to liability for non-feasance of an agent must, we submit, require a reversal and the dismissal of the complaint, or, at the least, the granting of a new trial.

Respectfully submitted,

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On the Memorandum

ALAN J. LITTAU

COPY RECEIVED

Date: JAN 31 1977

Lefrak Fisher, Myerson & Mandell

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